Supreme Court, U.S.
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No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

SAMUEL MARTINEZ-SERRANO

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

If a permanent resident alien has been charged with deportability for entering the United States without inspection after his admission for lawful permanent residence, does 8 U.S.C. S 1361 place the burden of proof on the alien to prove that he did *not* enter without inspection?

LIST OF PARTIES

Petitioner, Samuel Martinez-Serrano, was the respondent before the Executive Office for Immigration Review in deportation proceedings brought by the Immigration and Naturalization Service. Mr. Martinez-Serrano was the petitioner in the Court of Appeals, and the Immigration and Naturalization Service was the respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Samuel Martinez-Serrano respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on August 30, 1996.

OPINION BELOW

The opinion of the Court of Appeals is reported at 94 F.3d 1256, and appears as Appendix A.

JURISDICTION

Deportation proceedings were conducted herein pursuant to 8 U.S.C. S 1252(b). The Court of Appeals had jurisdiction to review the final order of the Board of Immigration Appeals pursuant to 8 U.S.C. S 1105a(a)(4). A timely Petition for Rehearing With A Suggestion For Rehearing En Banc was denied on November 19, 1996. Appendix B. This petition is filed within 90 days of the denial of the petition for rehearing, and is therefore timely. 28 U.S.C. S 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. S 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 8:

S 1361. Burden of proof upon alien

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not subject to exclusion under any provision of this Act. *In any deportation proceeding under chapter 5 [8 USCS SS 1251 et seq.] against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.* [emphasis added]

STATEMENT OF THE CASE

A. Statement Of Facts

The petitioner is a native and citizen of Mexico who was accorded lawful temporary resident status under the "Special Agricultural Workers" provisions of Section 210(a)(1) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. S 1160(a)(1), on July 8, 1987. AR 34, 100. By operation of law, he was adjusted to lawful *permanent* resident on December 1, 1989. AR 34, 79-80, 100. 8 U.S.C. S 1160(a)(2)(A); 8 C.F.R. S 210.5(a)(1). He has one United States citizen child who suffers from palsy of the right hand. The child is being treated at Shriners Hospital at no expense to the government. AR 98-99, 109. Petitioner also has three children who were born in Mexico. AR 91.

On February 20, 1990, petitioner went to Mexico because his mother, who had been caring for his three Mexican-born children, became ill. *Id.* Petitioner's intention was to take care of his children, and bring his family together. AR 92. He brought the children to Mexicali, on the Mexican side of the border. *Id.* Although there was no evidence that petitioner assisted the children in coming to the United States, petitioner and the three children were all arrested on February 26, 1990 by the INS inside the United States. AR 91.

B. Proceedings Below

The INS issued an order to show cause alleging that petitioner entered the United States without inspection on February 26, 1990, and that he was therefore deportable under former Section 241(a)(2) of the Act, 8 U.S.C. S

1251(a)(2) (1988). The petitioner admitted that he was not a citizen of the United States and that he was a native and citizen of Mexico, but denied entering without inspection. He also denied the charge of deportability. AR 77, 112.

The trial attorney for the INS called the petitioner as his only witness to establish deportability. When asked, however, about the circumstances of his "last entry," the petitioner refused to answer on the grounds that the answers could incriminate him. AR 90-91. Petitioner admitted only that he had been in Mexico for six days during February, 1990, and that he was apprehended by the INS, with his children, in the United States on February 26, 1990. AR 92. No other evidence was presented by the INS, either by testimony or documentation, regarding the circumstances of the entry.

The immigration judge (IJ) held that the INS had no burden of proof in this case, and that deportability had been established solely by means of the statutory presumption in Section 291 of the Act, 8 U.S.C. S 1361. Although the IJ acknowledged that petitioner had presented evidence that he was a lawful permanent resident, he did not discuss the effect of such evidence on the presumption or on the government's burden of proof. AR 63-64.

An appeal was taken to the Board of Immigration Appeals (BIA), but no brief could be filed because petitioner's representative was called to active duty in the Desert Storm conflict. AR 49. On July 29, 1991, the Board affirmed the decision of the IJ, and concluded that, *based on 8 U.S.C. S 1361*, petitioner's deportability had been established "by evidence that is clear, unequivocal and convincing." AR 47. No appeal was taken from that

decision. Petitioner next moved to reopen and reconsider the decision of the Board pursuant to 8 C.F.R. S 3.2, arguing, among other things, that he had satisfied his burden of proof under section 1361 by establishing that he had been accorded the status of lawful permanent resident. AR 18-19, 21. *He specifically questioned the sufficiency of the evidence to sustain the government's burden of proving by clear, unequivocal and convincing evidence that an entry without inspection had taken place.* AR 20-21. The Board denied the motion to reopen and reconsider on June 24, 1994, without addressing the question of the presumption or the sufficiency of the proof of deportability.

Petitioner sought review in the Court of Appeals, raising two issues:

> 1. Does the time for filing a petition for review in [the Court of Appeals] begin to run when the Board mails the decision to petitioner's old address, even though it had notice of a change of address, or when it mails the decision to the correct address of record?
>
> 2. Did the Board err in relying solely on the presumption created by 8 U.S.C. S 1361 to find that deportability had been established by clear, unequivocal and convincing evidence, even though the petitioner established that he was a lawful permanent resident of the United States?

Petitioner's Opening Brief (POB) at 2-3. In his Statement of the Case, petitioner specifically noted that the petition sought review of the Board's decision dismissing the appeal

and the order denying the motion to reopen and reconsider. POB at 6.

After the opening brief was filed, this Court decided *Stone v. INS*,____ U.S.___, 115 S.Ct. 1537 (1995), in which the Court expressly rejected the Ninth Circuit's tolling rule, *see Ogio v. INS*, 2 F.3d 959, 960 (9th Cir. 1993), and held that the finality of the underlying order of deportation was not affected by the subsequent filing of a motion to reconsider. Thus, in its answering brief herein, the INS argued that based on *Stone*, the Court of Appeals "lacked jurisdiction" to review *the finding of deportability* because petitioner failed to file a petition for review *from the July 29, 1991 BIA decision*. Respondent's Brief (RB) at 10-11. INS also argued that the Court of Appeals lacked jurisdiction to review the order denying the motion to reopen or reconsider because the petition for review was not filed within 90 days of the date of that decision.[1]

In a published decision, a panel of the Ninth Circuit held that the petition for review of the denial of the motion

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[1] Because the petition for review was filed more than 90 days after the date of the Board's decision, the clerk issued an order to show cause why the petition for review should not be dismissed for lack of jurisdiction. Petitioner filed a response to the order to show cause, and the INS filed a reply to the response and a motion to dismiss. Petitioner's response showed that the June 24 decision of the Board was first mailed to petitioner's accredited representative at his *former* address, AR 1-2, even though the representative had previously notified the Board of his new address. Annex D to petitioner's response to Order to Show Cause. After realizing its mistake, the Board re-mailed the decision to the representative's *correct* address on July 25, 1994, under cover of a letter dated July 22, 1994. *Id.*, Annex E. The court denied the motion to dismiss and ordered the parties to address the issue in their briefs.

to reopen or reconsider was timely because it was filed within 90 days of the date the BIA mailed its decision to the petitioner's representatives *correct* address of record. 94 F. 3d at 1259. However, it further held that petitioner had failed to address, in his opening brief, how the BIA abused its discretion in denying the motion to reconsider, and therefore had waived "this issue." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE PRESUMPTION PROVIDED FOR IN 8 U.S.C. S 1361 CANNOT SHIFT THE BURDEN OF PROOF TO A LAWFUL PERMANENT RESIDENT ALIEN TO SHOW THAT HE IS NOT DEPORTABLE. THE DECISION OF THE BIA HOLDING THAT IT DOES IS CONTRARY TO THE DECISIONS OF THIS COURT PLACING THE BURDEN OF PROOF ON THE GOVERNMENT IN DEPORTATION PROCEEDINGS.

The burden of proof in deportation proceedings has always been placed squarely on the government. The burden is a heavy one, requiring the government to "establish the facts supporting deportability by clear, unequivocal and convincing evidence." *Woodby v. INS*, 385 U.S. 276, 277 (1966). Even in exclusion proceedings, where the burden of proof is normally on the alien to prove that he or she is admissible, long-standing administrative practice, if not considerations of due process, has placed the burden *on the government* when the alien is a *permanent resident. Landon*

v. Plasencia, 459 U.S. 21, 35 (1982); *Matter of Salazar*, 17 I. & N. Dec. 167, 169 (BIA 1979).

In this case, *even though it was undisputed that the petitioner was a lawful permanent resident*, the immigration judge expressly held that the government *had no burden of proof*, and that deportability was established by the presumption contained in section 1361. The BIA agreed. This holding contravenes the most basic tenet of procedure in deportation proceedings against lawfully resident aliens, yet the Court of Appeals never even reached the issue.

This Court has had occasion to refer to the statute at issue here on only a few occasions. In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), the Court merely cited the statute in passing, noting that

> [i]n many deportation cases the INS must show only identity and alienage; the burden then shifts to the respondent to prove the time, place, and manner of his entry.

In *Landon v. Plasencia*, 459 U.S. 21, 35 (1982), the Court stated that

> although the Act provides that the burden of proof is on the alien in an exclusion proceeding, S 291, 8 U.S.C. S 1361 (1976 ed., Supp. V), the BIA has followed the practice of placing the burden on the Government when the alien is a permanent resident alien.

In *Kimm v. Rosenberg*, 363 U.S. 405 (1960), however, Justice Brennan cited the statute in discussing the proper allocation

of the burden of proof, noting that section 1361, like its predecessor, "placed the burden on the alien in a deportation proceeding *to show that he had been lawfully admitted to the country*." *Id.* at 413, n.2. As Justice Brennan explained:

> The courts . . . drew a sharp distinction between this issue and the matter of deportability owing to post-admission conduct. The failure of Congress to specify other issues on which the alien has the burden is confirmation of the correctness of these decisions. *Id.*

Cases from the Ninth Circuit itself are more to the point, and indeed leave no doubt that the burden of proof was not properly allocated in this case. The Ninth Circuit has held that once the government presents a *prima facie* case of deportability by proving alienage, the burden shifts to the alien under 8 U.S.C. S 1361 to produce evidence "tending to prove [] legal presence in the United States." *Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978). The same court has held that production of an alien registration receipt card ("green card") *satisfies* the burden imposed by section 1361 to show *lawful presence* in the United States, and that *the burden then shifts to the INS* to prove a *subsequent illegal entry*. *Gameros-Hernandez v. INS*, 883 F.2d 839, 841 (9th Cir. 1989); *Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9th Cir. 1975). These cases are consistent with the general rule requiring the government to prove deportability, and the observation by Justice Brennan that there is a distinction between the question of admission in the first instance and *post-admission conduct*. Thus, once an alien shows that he has been lawfully admitted, the burden is once again on the government to show some *conduct* which would warrant deportation.

In *Trias-Hernandez*, the INS carried its burden by submitting a Form I-213 (Record of Deportable Alien) containing statements by the alien to INS officers that he had entered illegally *subsequent to his admission as a lawful permanent resident*, as well as other documents which tended to corroborate the contents of the I-213. However, in *Gameros-Hernandez*, there was *no* I-213 or other documentary evidence, and only rather weak circumstantial evidence regarding the manner of entry, and the result was accordingly different.

In *Gameros-Hernandez*, the petitioner was admitted as a lawful permanent resident in March, 1975. In an incident which occurred on January 1, 1984, he was seen in a ditch on the United States side of the border near a hole in the international boundary fence, with an alien who was later determined to be undocumented. The Border Patrol found the two because a sensor had been activated, indicating that an illegal entry had possibly taken place. The INS instituted deportation proceedings against Gameros-Hernandez, alleging entry without inspection.

Gameros-Hernandez testified that while he and his family were visiting Mexico, he met the woman with whom he was later found and agreed to help her by meeting her on the U.S. side of the border. He testified that he was inspected and admitted to the United States with his family at a port of entry, and then went to the spot where he was found with the woman. Petitioner's wife also testified that she and the petitioner crossed the border and were inspected at a port of entry. The IJ concluded that both Gameros-Hernandez and his wife were not credible witnesses, adopted the government's theory that Gameros-Hernandez unlawfully

entered the United States through the hole in the boundary fence, and found him deportable. The BIA affirmed.

On review, the Court of Appeals began by noting that the subject of the deportation proceedings must, as an initial matter, make some showing that he or she is in the United States legally. The Court held that Gameros-Hernandez satisfied this initial burden by establishing by uncontradicted evidence that he was a lawful permanent resident in possession of a valid green card. The court then stated, "*It then became the task of the INS to prove by clear, unequivocal and convincing evidence that Gameros-Hernandez' entry into the United States after his visit to Mexico was without inspection.*" *Id.* at 841 [emphasis added]. The facts of *Gameros-Hernandez* bear a striking resemblance to the facts of the instant case, and here too, the immigration judge failed to recognize that the burden had shifted, and was on INS to prove that petitioner had made an illegal entry after his visit to Mexico. Obviously, the INS did not do so.

Although the IJ mentioned that the "only logical inference to be drawn from [petitioner's] testimony is that he, as well as his three Mexican born children, entered the United States without inspection as alleged," it is clear that he himself did not base his decision on this ground, but solely on the presumption created by section 1361. In addition, the Board never mentioned *any* evidence which might support a finding of deportability, and itself relied solely upon the presumption. AR 47. Under this Court's decision in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), the Board's reliance on the presumption is therefore the *only* ground upon which the BIA decision could be affirmed.

Nevertheless, even if the petitioner's testimony at the hearing is considered, it provides even less evidence of an unlawful entry than the evidence in *Gameros-Hernandez* did. In *Gameros-Hernandez*, the court held that even if Gameros-Hernandez' story was not specifically credited, the record contained "scant evidence" that he crossed the border in an unlawful manner. The court cited this Court's observation in *Woodby* that such ties as had been established by Gameros-Hernandez, a long-term resident of the United States, should not be lightly severed:

> This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. In words apposite to the question before us, we have spoken of "the solidity of proof that is required for a judgment entailing the consequences of deportation."

Gameros-Hernandez at 841-42, quoting *Woodby* at 285 [internal citation omitted]. The court in *Gameros-Hernandez* concluded that the circumstantial case presented by INS lacked the "requisite solidity of proof" and therefore did not satisfy the burden of clear, convincing and unequivocal proof that Gameros-Hernandez entered the United States without inspection on January 1, 1984. *Id.* at 842.

Here, there is no adverse credibility finding, nor is there any evidence that the petitioner was in such close proximity to the border at a place other than a designated port of entry to raise an inference that he had just "jumped

the fence." Here, the *only* evidence is that petitioner was in Mexico one day with his children and was in the United States with them the next, when he was arrested. There is absolutely no indication of *how* he entered.[2]
The evidence in this case is thus far less substantial than it was in *Gameros-Hernandez*, and does not constitute clear, convincing and unequivocal evidence that an illegal entry took place.[3]

The petitioner satisfied his burden under section 1361 to show that he was lawfully admitted into this country as a permanent resident.[4]
The burden then shifted back to the INS to prove by clear, convincing and unequivocal evidence that he had entered without inspection as alleged.

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[2] It should be noted that there was no evidence in *petitioner's* case as to how the *children* entered either, since the children's cases were severed from petitioner's. Even if there were, however, it could not be concluded by *clear, convincing and unequivocal evidence* that simply because the petitioner brought his children to Mexicali, he necessarily crossed with them illegally into the United States.

[3] There is no mention in the Board's decision of any "adverse inference" from petitioner's silence on the question of the manner of his entry, either. *Cf. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923). The decision therefore cannot be affirmed on the basis that such an adverse inference could supply the missing proof of deportability. *SEC v. Chenery*, *supra*.

[4] There is no question that the petitioner presented evidence that he was a lawful permanent resident, even though the Board for some reason failed to recognize this. In the deportation hearing, the petitioner submitted, without objection, his temporary resident card, Form I-688, which showed, on the reverse, that he had been adjusted to permanent resident. AR 100. The I-551, once issued, was submitted to the Board as an exhibit along with the motion to reopen and reconsider. AR 34.

Petitioner had no burden to show how he *physically* "entered" the country. Although section 1361 requires the alien to show the time, place and manner of his "entry" into the United States, the term "entry" is clearly a term of art and does not refer to a *physical crossing of the border*. First, as shown above, section 1361 requires only that an alien show that he has been "lawfully admitted" to this country. That, the petitioner did. Second, it is well established that a person who adjusts his status within the United States "is assimilated to the position of an alien outside the United States seeking entry as an immigrant." C. Gordon, S. Mailman and S. Yale-Loehr, *Immigration Law and Procedure*, S 51.03[3] (1996). No physical crossing of the border is required. Thus, to satisfy the burden imposed by the statute, no evidence of a physical entry is required at all, let alone evidence of the "last" entry, as erroneously required by the immigration judge. See AR 84.

Finally, an alien may be lawfully accorded the status of permanent resident, especially under the Special Agricultural Worker provisions, or its sister provision, 8 U.S.C. S 1255A, even though his "last" entry was completely *un*lawful. Indeed, section 1255A *required* that an applicant for legalization have entered illegally, or at least that his or her presence became unlawful, prior to January 1, 1982, in order to *qualify* for legalization. Even section 1255, the normal adjustment of status statute, no longer requires that an alien be "inspected and admitted" or paroled into the United States, in order to be adjusted to lawful permanent resident. *See* section 1255(i), added by Section 506 of Pub. L. No. 103-317, 108 Stat. 1724, effective October 1, 1994.

There are many other means of adjusting one's status notwithstanding a "last" entry that was illegal. *See, e.g.*, 8

U.S.C. S 1254(a) (providing for suspension of deportation for aliens who are deportable for, among other grounds, having entered without inspection); 8 U.S.C. S 1259 (providing for "registry" of aliens present in the United States before January 1, 1972, regardless of manner of entry); and 8 U.S.C. S 1159 (relating to adjustment of status of asylees after one year, regardless of how they entered).

Since all of the foregoing classes of immigrants can show a lawful presence in the United States without ever having legally "entered" in the sense of being inspected by an immigration official while physically crossing the border, then the burden imposed by section 1361 cannot possibly require proof of the manner of "last entry." It requires only a showing that *lawful status was obtained*. See *Kimm v. Rosenberg*, *supra*, Brennan, J., dissenting. Indeed, that appears to be the reason the alien is entitled to the assistance of the government in producing his visa, green card, or other record of his lawful "admission." Section 1361 clearly does not contemplate that the government will make a record of each and every entry by every alien, nor does the law require the alien himself to do so. If lawful *presence* is shown by production of a green card or similar evidence, the burden shifts to the INS to establish a *subsequent* unlawful entry. *Gameros-Hernandez*. The petitioner satisfied his statutory burden by showing admission, *i.e.*, adjustment, as a lawful permanent resident. The INS failed to carry its burden of proving a subsequent unlawful entry by clear, unequivocal and convincing evidence. Therefore, the Board erroneously relied upon the presumption created by the statute to find that deportability had been established, and its decision should be reversed.

II. THE COURT OF APPEALS SHOULD NOT HAVE DECLINED TO REACH THE IMPORTANT SUBSTANTIVE ISSUE HEREIN.

Contrary to what the Court of Appeals concluded, the petitioner's opening brief was not limited to a discussion of why "the BIA's dismissal of his appeal of the IJ's decision was erroneous." 94 F.3d at 1259. The argument to which the Court referred to is Argument "II" of petitioner's opening brief. See POB at 13-20. That argument dealt with the *substantive* issue of whether the presumption provided for in 8 U.S.C. S 1361 alone can suffice to establish deportability where the alien presents evidence of lawful admission for permanent residence. Both the IJ and the Board relied *solely* on the presumption to conclude that deportability had been established by "clear, convincing and unequivocal evidence." The motion to reopen and reconsider sought, among other things, to correct this error.

As the court below conceded, the petitioner expressly stated in his Statement of the Case that his petition challenged the correctness of *both* the original BIA decision *and* the denial of the motion to reconsider. POB at 6. However, contrary to what the Court of Appeals stated, the argument section of the brief dealing with this issue ***never once refered to the original decision of the Board***. Instead, it argued only why the burden of proof was *not* carried by the INS. POB 13-20. An examination of the issues raised and the brief itself will show that what petitioner was guilty of is not failure to *brief* the issue as the panel stated, but rather failure to *characterize* the issue as whether the Board "abused its discretion" in denying the motion to reconsider its finding that deportability had been established by means of the presumption. Instead, petitioner argued that the Board

"erred" in concluding that deportability had been established by means of the presumption. The difference, if any there be, is more ephemeral than real; it is not one of substance but of form. It is surely not a distinction which merits permanent banishment from this country without benefit of judicial review of the evidence of deportability.

As shown above, it was not even until the motion to reconsider was filed that this issue was *raised* before the Board. The issue was not raised in the original appeal for the simple reason that petitioner's representative was called to active duty in Desert Storm, and was unable to file a brief. AR 49. He *was* able to raise the issue though a motion to reconsider, *which is perfectly proper*. Even though that motion squarely raised the issue of the impropriety of the finding of deportability made by the IJ and affirmed by the Board, the BIA failed to even address the issue in its order denying the motion to reconsider. As a result, the only "finding of deportability" was in the IJ's decision, and in the Board's decision on the initial appeal.

Seizing on the *BIA's* failure to even *address* this issue in denying the motion to reconsider, and the consequent lack of any mention of the proof of deportability in that decision, INS argued in its answering brief that "in his brief, however, petitioner challenges only the original finding of deportability and does not contest the denial of his motion to reopen or reconsider." [emphasis in original; footnote omitted]. RB at 12. ***Nothing could be further from the truth***, yet the court below adopted this argument and held that petitioner had waived the issue of the correctness of the denial of the motion to reopen or reconsider. In doing so, the court ignored the reality of the situation, which was that *both sides* had fully briefed the substantive issued involved. POB at 13-

20; RB at 18-24. It also ignored the arguments made in petitioner's reply brief which showed the fallacy of the government's "waiver" argument. In his reply brief, the petitioner stated:

> While petitioner did refer to the wording of the Board's original order citing the presumption in section 291 for its conclusion that "deportability has been established by evidence that is clear, unequivocal and convincing" AR 47; Petitioner's Opening Brief (POB) at 6, *this was necessary because the Board failed to even address the issue in its decision on the motion to reconsider.* AR 2-4. That, however, does not mean that the "finding of deportability," as the INS puts it, or more precisely, *the issue of whether the presumption alone is sufficient to support an order of deportation*, was not challenged in the motion to reconsider or is not reviewable here.

Petitioner's Reply Brief (PRB) at 2-3 [italics added; underlining in original].

Thus, petitioner made it crystal clear that INS was attempting to introduce a red herring into the case. Petitioner tried to explain that the *substantive issue* regarding the sufficiency of the proof adduced at the hearing had been properly raised, but the decision of the Board on the motion to reconsider made it *appear* as if the argument did not refer to that decision. In addition, it was explained that a motion for reconsideration is designed *for the very purpose* of challenging a finding made by the Board *in its original*

decision. *See Matter of Cerna*, Interim Decision 3161 (BIA 1991).[5]

PRB at 4. Clearly, an alien is entitled to request *reconsideration* of matters already decided. Indeed, that is what "*re*"-consideration means. Just as clearly, an alien can obtain review of the *denial* of a motion to reconsider, which is a separately appealable final order of deportation. *See Stone*, 1995 U.S. LEXIS 2846 at *18. Thus, it was argued that a denial of a motion to reconsider, which can ask the Board to reconsider its "finding of deportability," *was* reviewable upon timely petition for review under *Stone*. PRB at 3-5.

INS, on the other hand, would have had the Court believe that motions to reconsider can *not* challenge a "finding of deportability," although why this should be so was never explained by the INS. What the INS argument really boiled down to was an argument that the finding of deportability could *never* be challenged on petition for review of a denial of a motion to reconsider; that somehow it had to *always* be raised in a separate petition from the denial of the original appeal. See Respondent's Brief at 12-13 ("*Since petitioner failed to file a petition for review from the July 29, 1991 decision, this Court has no jurisdiction to review the underlying finding of deportability.*") This argument was

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[5] Indeed, petitioner styled his motion a "motion to reopen and reconsider" because one argument was based on a change in the law since his hearing and the other was simply a request to "reconsider" an earlier ruling. See Matter of Cerna. Having failed to consider the legal error raised, the BIA erroneously referred to the motion simply as a motion to "reopen."

patently erroneous, as pointed out in Petitioner's Reply Brief at 1-2.[6]

The gravamen of respondent's argument in its brief, however, was not the waiver issue anyway, but rather was the argument that petitioner had somehow not raised the issue of the sufficiency of proof of deportability *in his motion to reconsider*. See Respondent's Brief at 8. However, the question of the sufficiency of the presumption in this case to support a finding of deportability was raised *several times* in the motion to reconsider. AR 18-21; see PRB at 5-6. Indeed, before the BIA, the INS *itself* understood the motion to reconsider as raising *three* issues, one of which was **"whether or not the [petitioner] entered the United States without inspection."** AR 5.

The petitioner made it clear that he was contesting the propriety of the Board's denial of the motion to reconsider. *In his opening brief,* the petitioner took pains to point out what was raised in the motion and what he was asking the court to review:

> The petitioner moved to reopen and reconsider the decision of the Board, arguing, among other things, that he had satisfied his burden of proof under Section 291 of the Act by establishing that he had been accorded the status of lawful permanent

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[6] INS abandoned this clearly frivolous argument at oral argument, where it changed its attack to arguing that the issue was not properly raised on the motion to reconsider because it could have been raised earlier. Petitioner responded to that argument, which is as fallacious as its original argument, by letter dated March 19, 1996, responding to new authorities cited by INS at oral argument. Clearly, the Court rejected this latest argument by INS.

> resident. AR 18-19, 21. He specifically questioned the sufficiency of the evidence to sustain the Service's burden of proving by clear, unequivocal and convincing evidence that an entry without inspection had taken place. AR 20-21. The Board denied the motion to reopen and reconsider on June 24, 1994. This petition seeks review of the Board's decision dismissing the appeal and the order denying the motion to reopen and reconsider.

POB at 6. The petitioner then went on, quite logically, to argue in the "argument" portion of the brief why the presumption was *not* sufficient in this case to prove deportability. It is hard to see how the court construed such an argument as a "waiver" of the *sole substantive issue* presented on appeal.

To say that the petitioner failed to raise the issue of the propriety of the denial of his motion to reconsider simply because he failed to expressly explain that he was alleging an "abuse of discretion" in that decision, even though that is the *standard of review,* and even though the substantive *issue*, which was raised for the first time in the motion to reconsider, was fully briefed, is to elevate form over substance.

A. Even If The Issue Had Not Been Fairly Raised In Petitioner's Opening Brief, The Court Should Have Applied One Of The Well-Recognized Exceptions To The Waiver Rule In This Case.

The very case cited by the court below for the proposition that an issue raised for the first time in a reply brief will not be considered recognized that there are exceptions to this "general rule." *See Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990). In another case, *United States v. Ullah*, 976 F.2d 509 (9th Cir. 1992), the court explained:

> Three main exceptions to that rule exist. First, we will review an issue not present in an opening brief for "good cause shown," Fed R. App. P.2, or "if a failure to do so would result in manifest injustice." *United States v. Loya*, 807 F.2d 1483, 1487 (9th Cir. 1987). Second, "we have discretion to review an issue not raised by appellant...when it is raised in the appellee's brief." *In re Riverside Linden Investment Co.*, 945 F.2d 320, 324 (9th Cir. 1991). Third, we may review an issue if the failure to raise the issue properly did not prejudice the defense of the opposing party.

Id. at 514. All three exceptions are applicable here. The IJ and the Board clearly erred in applying the presumption of deportability in this case. See POB at 13-20. The Board's conclusion is squarely precluded by decisions of this Court and the Ninth Circuit which are precisely on point. This is

petitioner's *only chance* for judicial review of the Board's order of deportation, which will terminate his permanent residence, and either force him to take his disabled citizen child back to Mexico with him, or abandon the child here. Thus, a reversal of the Board's error is "'necessary to prevent a miscarriage of justice,' and hence is required even if the error is not properly raised." *Id.* [citation omitted].

Second, the issue, even if not properly framed in the opening brief, is addressed in the *respondent's* brief. As shown above, INS itself raised the procedural issue by arguing that *Stone*, decided after the opening brief was filed, created a jurisdictional bar to reviewing the order of deportation absent a separate petition for review from the order dismissing the appeal. Petitioner responded to that argument in his reply brief by showing how the issue was properly raised in the motion to reconsider, and that accordingly, under *Stone*, the petition for review, which raised the propriety of the Board's denial of that motion, was the proper vehicle for considering the issue. INS also responded to the *substantive* argument concerning the sufficiency of the evidence of deportability. See RB at 18-24. Both issues were addressed again in petitioner's reply brief and at oral argument, and the procedural issue was addressed *again* by both sides in letters to the court regarding additional authorities *after* oral argument. Under these circumstances, "the discussion of the issue . . . [was] sufficient to permit an informed resolution of the dispute and its application to [petitioner]." *Ullah* at 514.

Third, the government suffered no prejudice as a result of any failure to frame the issue in the opening brief as an "abuse of discretion" issue. The actual, substantive issue was thoroughly briefed and argued by both sides. As

shown in petitioner's reply brief, even though the standard of review of a denial of a motion to reconsider is abuse of discretion, what petitioner was arguing was an *error of law*, which is reviewed *de novo*, and which is *also* an abuse of discretion. PRB at 4, n.2; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The parties explored the substantive issue as fully as possible, and the Court should not have hesitated to reach it because of any perceived technical failure to properly frame the issue.

The interests of justice demand that the one substantive issue in this case be reached by the courts. The issue is of exceptional importance not only to the petitioner and his children, but to all permanent residents who are at risk of being deported without proper allocation of the burden of proof. To deprive petitioner of his one opportunity for judicial review because of what is at worst an error of form is to deprive him of one of the most valuable safeguards a resident alien has: the assurance that he will not be deported unless a *court* concludes that the order of deportation is based upon reasonable, substantial and probative evidence. 8 U.S.C. S 1252(b)(4).

As so eloquently stated recently in *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996):

> "In the absence of judicial review, grave injustices could take place for which our government and our people would have to bear the moral responsibility . . . Courts may err also, but the additional level of review is a safety mechanism designed to catch at least the most egregious of the inevitable human errors."

Id., 1996 U.S. App. LEXIS 26412 at *51-52, Reinhardt and Hawkins, JJ., specially concurring. *See also id.* at *50, Kozinski, J., concurring ("Review by a tribunal outside the agency helps correct these rare but tragic errors. . . [T]he effort is surely worth the candle."). Review is essential here to correct just such an error.

B. This Court Is Not Precluded From Reviewing The Substantive Issue Which The Court Of Appeals Should Have, But Did Not Consider.

This Court has previously granted certiorari and proceeded to determine the merits of a question which was properly presented to, but not decided by, the Court of Appeals. In *Healy v. James*, 408 U.S. 169; 92 S.Ct. 2338; 23 L. Ed.2d 266 (1972), a group of students seeking to form a local chapter of Students for a Democratic Society at a state-supported college were denied recognition as a campus organization, and sued for violation of their first amendment rights. The Second Circuit declined to reach the substantive First Amendment issues, and affirmed on the grounds that the plaintiffs had defaulted procedurally by not complying with the requirements necessary for obtaining recognition by the college. This Court held that the Court of Appeals should not have declined to reach the substantive issue, and reversed on the merits. Similarly, in this case, the Court of Appeals declined to reach the substantive issue solely on procedural grounds. As in *Healy*, those grounds were not valid. Therefore, the Court should grant certiorari and proceed to a determination of the important question regarding the allocation of the burden of proof herein.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: February 17, 1997

Respectfully submitted,

MARC VAN DER HOUT
Counsel of Record
RALPH J. LEARDO

Attorneys for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAMUEL MARTINEZ-SERRANO, *Petitioner,* v. IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*	No. 94-70674 INS No. A29-264-170 OPINION

Petition to Review a Decision of the Immigration and Naturalization Service

Argued and Submitted
March 13, 1996—San Francisco, California

Filed August 30, 1996

Before: Cynthia Holcomb Hall and Melvin Brunetti, Circuit Judges, and Charles R. Weiner,* District Judge.

Opinion by Judge Brunetti

SUMMARY

Immigration/Litigation and Procedure (Civil)

The court of appeals denied a petition for review of an order of the Board of Immigration Appeals (BIA). The court held that the time for filing a petition for review begins to run when the BIA mails its decision to the correct address.

*Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

In February 1990, the Immigration and Naturalization Service (INS) began deportation proceedings against Samuel Martinez-Serrano. The immigration judge found him deportable and granted him voluntary departure. In October 1990, Martinez-Serrano filed a notice of appeal to the BIA but he never filed a written brief. In July 1991, the BIA dismissed the appeal. In October 1991, Martinez-Serrano filed a motion to reopen and reconsider the decision of the BIA. The primary basis of the motion was to allow the BIA to remand for waiver of deportability for humanitarian purposes. Martinez-Serrano also contended that the BIA erred in dismissing his appeal.

On June 24, 1994, the BIA denied the motion to reopen. The BIA first mailed its decision to the address that Martinez-Serrano's representative had originally supplied. The representative had moved and had notified the BIA of his new address on September 30, 1993, long before the BIA issued its decision. When the BIA realized its mistake, it sent another copy of the decision to the correct address on July 22, 1994.

On October 20, 1994, Martinez-Serrano petitioned for review of the BIA's dismissal of his appeal and denial of his motion to reopen and reconsider. Martinez-Serrano argued that on the petition for review of the denial of the motion to reopen or reconsider, the court of appeals reviews both the decision dismissing the appeal and the denial of the motion to reopen or reconsider. The INS argued that the petition for review of the denial of the motion to reopen and reconsider was untimely because it was filed more than 90 days after the June 24 opinion.

[1] The finality of the underlying order was not affected by the subsequent filing of the motion to reconsider. [2] Martinez-Serrano did not file a separate petition for review of the BIA's dismissal of his appeal. He failed to file a petition for review of the BIA's dismissal of his appeal within the 90 days after the issuance of the opinion. His petition for review

of the denial of his motion to reopen and reconsider was filed over three years after the BIA's dismissal of his appeal. The 90-day limitation period had run on Martinez-Serrano's petition for review insofar as it sought review of the dismissal of his appeal.

[3] A petition for review may be filed not later than 90 days after the date of issuance of the final deportation order. The issue was whether the time for filing the petition for review of the denial of the motion to reopen and reconsider began to run when the BIA mailed its decision denying the motion to Martinez-Serrano's representative's old address or when the BIA mailed its decision to the correct address.

[4] Both the Second and Fifth Circuits have held that the date of issuance is the date the final deportation order was mailed to the correct address.

[5] That rule is sound because a petitioner should not be penalized for the BIA's failure to comply with the terms of the federal regulations. The BIA had Martinez-Serrano's representative's correct address, yet sent the decision to the wrong address. The court had jurisdiction to review the BIA's denial of the motion to reopen and reconsider.

[6] Issues raised in a brief that are not supported by argument are deemed abandoned. An issue referred to in an appellant's statement of the case but not discussed in the body of the opening brief is deemed waived. [7] In his opening brief, Martinez-Serrano failed to address how the BIA abused its discretion by denying his motion to reopen and reconsider its decision. He had thereby waived that issue.

COUNSEL

Ralph J. Leardo, San Francisco, California, for the petitioner.

Frank W. Hunger, Office of Immigration Litigation, United States Department of Justice, Washington, D.C., for the respondent.

OPINION

BRUNETTI, Circuit Judge:

Samuel Martinez-Serrano, a citizen of Mexico, petitions for a review of the Board of Immigration Appeals (BIA) dismissal of his appeal and denial of his motion to reopen and reconsider.

I. BACKGROUND

On February 27, 1990, the Immigration and Naturalization Service (INS) began deportation proceedings against Martinez-Serrano for entering the United States without inspection. The Immigration Judge (IJ) found Martinez-Serrano deportable and granted him voluntary departure.

On October 3, 1990, the petitioner filed a notice of appeal to the BIA, contending that the IJ did not need to find him deportable before granting him voluntary departure. He indicated that he intended to file a separate written brief or statement. He, however, did not provide a separate written brief. On July 29, 1991, the BIA dismissed Martinez-Serrano's appeal, stating: "[t]he relief the respondent is requesting cannot be accorded by the immigration judge or this Board." The BIA also found that petitioner's deportability had been established by clear, unequivocal, and convincing evidence.

On October 28, 1991, petitioner filed a motion to reopen and reconsider the decision of the BIA. The primary basis of the motion was to allow the BIA to remand for a waiver of deportability for humanitarian purposes pursuant to INA

§ 241(a)(1)(E)(ii), on the ground that he was aiding his three Mexican children to cross the border when he was arrested. He stated that INA § 241(a)(1)(E)(ii) was not available to him when he appeared before the IJ and at the time he appealed to the BIA because it was not amended until November 29, 1990. He also contended that the BIA erred in dismissing his appeal.

On June 24, 1994, the BIA denied petitioner's motion to reopen. The BIA reasoned that petitioner was charged with entering without inspection, not charged with deportability as a smuggler. The BIA stated that INA § 241(a)(1)(E)(iii) was presumably what petitioner was referring to in his brief, because § 241(a)(1)(E)(ii) only applies to aliens who smuggle their family members prior to May 5, 1988 and petitioner smuggled his children in February 1990. The BIA then noted that § 241(a)(1)(E)(iii) does not apply to petitioner because he was not charged with smuggling aliens.

The BIA first mailed its June 24, 1994 decision to the address that the petitioner's representative had originally supplied. The petitioner's representative had moved and notified the BIA of his new address by mailing a letter to the Executive Office of the Immigration Review, Board of Immigration Appeals on September 30, 1993—long before the BIA issued its decision. When the BIA realized the mistake it made, it sent another copy of the decision to the correct address on July 22, 1994.

On October 20, 1994, Martinez-Serrano filed a petition for review. On October 27, 1994, this Court issued an order to show cause why the petition for review should not be dismissed for lack of jurisdiction, as it was filed more than 90 days after the date of the BIA's June 24, 1994 decision. Martinez-Serrano filed a response to the order to show cause, and the INS filed a reply to the response and a motion to dismiss. This Court denied the INS' motion to dismiss for lack of jurisdiction and ordered the parties to address in their briefs

whether this Court should adopt the Second Circuit's approach with respect to this Court's jurisdiction over this petition.

II. BIA'S DISMISSAL OF APPEAL OF IJ'S DECISION

Martinez-Serrano argues that on a petition for review of the BIA's denial of the motion to reopen or reconsider, this Court reviews both the decision dismissing the appeal *and* the denial of the motion to reopen or reconsider. For support, he cites *Padilla-Agustin v. INS*, 21 F.3d 970, 973 (9th Cir. 1994) and *Ogio v. INS*, 2 F.3d 959, 960 (9th Cir. 1993).

8 U.S.C. § 1105a(a)(1) states that "a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order." This statutory time limit is both mandatory and jurisdictional. *Caruncho v. INS*, 68 F.3d 356, 359 (9th Cir. 1995) (quoting *Hernandez-Rivera v. INS*, 630 F.2d 1352, 1354 (9th Cir. 1980)).

In *Padilla-Agustin* and *Ogio*, we held that "a motion to reopen or reconsider, or a petition for review filed within the statutory time limit would make an otherwise final appealable order . . . no longer appealable in this court until the motion is denied or the proceedings have been effectively terminated." *Caruncho*, 68 F.3d at 359 (internal quotations omitted) (quoting *Chung v. INS*, 720 F.2d 1471, 1474 (9th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984)). In other words, the filing of a motion to reopen or reconsider effectively tolled the statutory time in which to appeal the underlying final order.

[1] In *Stone v. INS*, 115 S. Ct. 1537 (1995), the Supreme Court expressly rejected our tolling rule and held that the finality of an underlying order was "not affected by the subsequent filing of a motion to reconsider." *Id.* at 1549. *See Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995) (noting how *Stone* overruled *Padilla-Agustin* and *Ogio*); *Caruncho*, 68 F.3d at

360 (same). Thus, a deportation order is "final when issued, irrespective of the later filing of a reconsideration motion, and the aggrieved party would seek judicial review of the order within the specified period." *Id.* at 1544.

[2] Martinez-Serrano did not file a separate petition for review for the BIA's dismissal of his appeal. Moreover, he failed to file a petition for review of the BIA's dismissal of his appeal within the 90 days after the issuance of the opinion. He only filed the petition for review for the denial of his motion to reopen and reconsider, over three years after the BIA's dismissal of his appeal. The ninety-day limitation period has run on Martinez-Serrano's petition for review insofar as it seeks review of the BIA's dismissal of his appeal. This Court does not have jurisdiction to review the BIA's dismissal of his appeal of the IJ's finding of deportation.

III. JURISDICTION TO REVIEW THE BIA'S DENIAL OF MOTION TO REOPEN AND RECONSIDER

The INS argues that Martinez-Serrano's petition for review for denial of his motion to reopen and reconsider is also untimely, as it was filed on October 20, 1994—more than 90 days after the BIA's June 24, 1994 opinion. We disagree.

[3] 8 U.S.C. § 1105a(a)(1) states that "a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order." 8 U.S.C. § 1105a(a)(1). As above, this time limit is mandatory and jurisdictional. *Caruncho*, 68 F.3d at 359 (quoting *Hernandez-Rivera*, 630 F.2d at 1354). The issue is whether the time for filing the petition for review began to run when the BIA mailed its decision denying the motion to reopen and reconsider to petitioner's representative's old address, or when the BIA mailed its decision to the correct address. More specifically, the question is "what does 'the date of issuance' mean in this context?". This Circuit has not dealt with this issue.

[4] The Second and Fifth Circuits, however, have dealt directly with this issue and both have held that "the date of issuance" is the date the final deportation order was mailed to the correct address. *Zaluski v. INS*, 37 F.3d 72, 73 (2d Cir. 1994); *Ouedraogo v. INS*, 864 F.2d 376, 378 (5th Cir. 1989).

In *Zaluski*, Zaluski's attorney followed the procedures for notifying the BIA when he changed his address. *Zaluski*, 37 F.3d at 73. The BIA nevertheless mailed its decision to Zaluski's counsel's former address. *Id.* Then, "[t]he BIA apparently learned of the error and, . . . mailed another copy of its decision to the lawyer's current address." *Id.* The Second Circuit stated that the BIA's regulations, which require service of its decisions, specify that decisions be mailed to the appropriate party. *Id.* (quoting 8 C.F.R. §§ 3.1(f), 3.13). It held that the decision was not mailed to the appropriate party until it was directed to the address duly recorded with the BIA. *Id.* "[T]ime for filing a review petition begins to run when the BIA complies with the terms of federal regulations by mailing its decision to petitioner's [or his counsel's] address of record." *Id.* (quoting *Ouedraogo*, 864 F.2d 378 and *Lee v. INS*, 685 F.2d 343, 344 (9th Cir. 1982)).

In *Ouedraogo*, the petitioner claimed that he was never advised of the BIA's decision and was never provided with a copy of the BIA's decision. *Ouedraogo*, 864 F.2d at 378. The record did not show when the BIA mailed a copy of its order to the petitioner. *Id.* Because the INS could not establish when it mailed the BIA's decision, the Fifth Circuit declined to dismiss the appeal for untimely filing of the review petition. *Id.*

In this case, the circumstances of the mailing of the BIA decision denying the motion to reopen and reconsider are exactly like the ones in *Zaluski*. Martinez-Serrano's representative notified the BIA of his change in address. The BIA proceeded to mail its decision to the wrong address. One month later, the BIA sent the decision to the correct address. The

BIA failed to comply with the terms of the federal regulations by mailing its decision to the incorrect address.

The INS concedes that the facts in *Zaluski* are similar to the facts in this case, but contends that the Second and Fifth Circuits erroneously equated "issuance" of the final order with "service" of the order. The INS argues that petitioner had "more than ample time to file his petition for review within ninety days of the date noted on the decision." Petitioner's time to file a petition for review was shortened by a third of the time allotted for filing a review petition. He had sixty days, as opposed to ninety days, to file a review petition. The INS cites *Ashby Enterprises v. Weitzman, Dym & Assocs.*, 780 F.2d 1043 (D.C. Cir. 1986) for the proposition that the court clerk's failure to send notice of the court's judgment to the defendant does not extend time for filing a notice of appeal. *Ashby Enterprises, Ltd.* is not helpful because, as petitioner correctly notes, *Ashby Enterprises* deals with Federal Rule of Civil Procedure 77(d) and that Rule expressly states that lack of notice of the entry by the clerk does not affect the time to appeal. We find *Ashby Enterprises* inapposite and are not therefore persuaded by the INS' arguments.

[5] We adopt the rule in *Zaluski* and *Ouedraogo*. *See United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987), *cert. denied*, 114 S.Ct. 1324 (1944)("[A]bsent a strong reason to do so, we will not create a direct conflict with other circuits."). The rule in *Zaluski* and *Ouedraogo* is sound because the petitioner should not be penalized for the BIA's failure to comply with the terms of the federal regulations. The BIA had petitioner's representative's correct address, yet sent the decision to the wrong address. This Court therefore has jurisdiction to review the BIA's denial of the motion to reopen and reconsider.

IV. BIA'S DENIAL OF MOTION TO REOPEN AND RECONSIDER

[6] Federal Rule of Appellate Procedure 28(a)(6) provides: "The argument must contain the contentions of the appellant

on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. . . . ." FRAP 28(a)(6). Issues raised in a brief that are not supported by argument are deemed abandoned. *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992). Furthermore, an issue referred to in the appellant's statement of the case but not discussed in the body of the opening brief is deemed waived. *Simpson v. Union Oil Co.*, 411 F.2d 897, 900 n.2 (9th Cir.), *rev'd on other grounds*, 396 U.S. 13 (1969). "It is well established in this circuit that [t]he general rule is that appellants cannot raise a new issue for the first time in their reply briefs." *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990)(citation and internal quotations omitted).

[7] In the Statement of the Case, petitioner states: "This petition seeks review of the Board's decision dismissing the appeal and the order denying the motion to reopen and reconsider." Petitioner, however, addresses in the argument portion of his opening brief only two issues: 1) when the ninety-day limitation runs; and 2) that the BIA's dismissal of his appeal of the IJ's decision was erroneous. He fails to address how the BIA abused its discretion by denying his motion to reopen and reconsider its decision. Martinez-Serrano has thereby waived this issue. The petition for review is DENIED.

DENIED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL MARTINEZ-SERRANO,	)	No. 94-70674
	)	INS No.: A29-264-170
Petitioner,	)	
	)	
vs.	)	ORDER
	)	
IMMIGRATION AND NATURALIZATION SERVICE,	)	
	)	
Respondent.	)	
	)	

Before: HALL and BRUNETTI, Circuit Judges, and WEINER,*

District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hall and Brunetti have voted to reject the suggestion for rehearing en banc, and Judge Weiner recommends rejection of the suggestion.

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*Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
961789 FEB 18 1997
OFFICE OF THE CLERK

No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

SAMUEL MARTINEZ-SERRANO

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL APPENDIX

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U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

==========

File: A29 264 170 - San Francisco Date: JUL 29 1991

In re: SAMUEL MARTINEZ-SERRANO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James Michael Hoffman
Accredited Representative
United States Catholic Conference
Migration and Refugee Services
582 Market Street, Suite 318
San Francisco, California 94104

ON BEHALF OF SERVICE: Mike A. Nisperos, Jr.
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - Entered without inspection

APPLICATION: Voluntary departure

ORDER:

PER CURIAM. The decision of the immigration judge is affirmed. We have not been persuaded by the respondent's contentions. A request the respondent has made for oral argument before this Board is denied as a matter of discretion. See 8 C.F.R. § 3.1(c).

The relief the respondent is requesting cannot be accorded by the immigration judge or this Board. He wants to leave the United States voluntarily without a determination on whether he is deportable as charged in the Order to Show Cause. According to the respondent, he could then leave the United States and return immediately on the basis of his temporary resident status as a "Special Agricultural Worker." See generally section 210 of the Immigration and Nationality Act, 8 U.S.C. § 1160, for information about that status.

Pursuant to the provisions of 8 C.F.R. § 242.5, the district director could have allowed the respondent to leave the United States voluntarily without the institution of deportation proceedings. The decision on whether to institute deportation proceedings against the respondent was a matter of prosecutorial discretion. See Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971). When the district director has instituted such proceedings against an alien, however, the immigration judge who presides over the proceedings must make a finding on deportability. Neither the immigration judge nor this Board can allow the alien to depart from the United States voluntarily without making that determination. Id. Moreover, in the present case, we are satisfied that the respondent's deportability has been established by evidence that is clear, unequivocal, and convincing. See section 291 of the Act, 8 U.S.C. § 1361. The respondent's appeal, accordingly, is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

(Signature) James P. Morris
FOR THE BOARD

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

==========

File: A29 264 170 - San Francisco Date: JUL 29 1991

In re: SAMUEL MARTINEZ-SERRANO

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: James Michael Hoffman
Accredited Representative
United States Catholic Conference
Migration and Refugee Services
582 Market Street, Suite 318
San Francisco, California 94104

ON BEHALF OF SERVICE: Roger S. Jackson
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] -
Entered without inspection

APPLICATION: Motion to Reopen

ORDER:

The respondent has made a motion to reopen deportation proceedings in order to apply for a waiver of deportability pursuant to section 241(a)(1)(E)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(E)(ii). The motion will be denied.

The respondent is a native and citizen of Mexico who initially entered this country without inspection in approximately 1980. He was granted temporary lawful permanent resident status in 1987, as a special agricultural worker ("SAW"), pursuant to section 210(a)(1) of the Act, 8 U.S.C. § 1160(a)(1). On February 26, 1990, he was arrested by immigration officials after he attempted to smuggle his three minor children across the Mexican border without inspection. An Order to Show Cause was issued on February 27, 1990, charging him with deportability pursuant to section 241(a)(2) of the Act, 8 U.S.C. §§ 1251(a)(2), as one who has entered without inspection. He was not charged with deportability as a smuggler. At his deportation proceeding on September 24, 1990, the respondent was found deportable by the immigration judge based on the fact that he admitted alienage but refused to divulge the time and manner of his entry. He then applied for and was granted voluntary departure pursuant to section 244(e) of the Act, 8 U.S.C. § 1254(e). The respondent then appealed, asserting that the immigration judge erred in concluding that he was required to find the respondent deportable before granting him the privilege of voluntary departure. In a decision dated July 29, 1991, the Board concluded that, although the district director could have allowed the respondent to depart voluntarily without the institution of deportation proceedings, he did not do so. Once deportation proceedings were instituted, the immigration judge was required to make a finding of deportability and the Board of Immigration Appeals was not the proper forum in which to seek a review of the rationale underlying a district

director's decision in this regard. See Matter of Ramirez-Sanchez, 18 I&N Dec. 503 (BIA 1980); Matter of Marin, 16 I&N Dec. 581 (BIA 1978); Matter of Lennon, 15 I&N Dec. 9 (BIA 1974); Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971). The respondent has now made a motion to reopen to allow him to apply for a waiver of inadmissibility pursuant to section 241(a)(1)(E)(ii) of the Act, which was not enacted until after the immigration judge's decision in this case.

A party who seeks a remand or to reopen proceedings to pursue relief bears a heavy burden of proving that if the proceedings before the immigration judge were reopened, with all the attendant delays, the new evidence would likely change the result in the case. Matter of Coelho, Interim Decision 3172 (BIA 1992). Motions to reopen will not be granted unless it appears to the Board that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. § 3.2 (1993). Accordingly, the Board may deny a motion to reopen based upon the failure to establish a prima facie case for the relief sought, in the absence of previously unavailable material evidence, and in the exercise of discretion.

In this case, the respondent has not established statutory eligibility for the relief sought because he was found deportable under section 241(a)(2) of the Act (now 241(a)(1)(B)), and the waiver he seeks waives deportability only under section 241(a)(1)(E)(i) of the Act for an alien who is deportable as one who "knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.;" As the respondent has not been

charged under section 241(a)(1)(E)(i) of the Act, he needs no 241(a)(1)(E)(iii) waiver. 1/

Furthermore, even if he had been so charged under that section and was granted a waiver, he would remain deportable pursuant to section 241(a)(2), for which there exists no waiver.2/ Accordingly, the motion to reopen and remand will be denied.

ORDER: The motion to reopen and remand is denied.

(Signature) Fred W. Vaca
FOR THE BOARD

1/ Although the respondent refers repeatedly to a section 241(a)(1)(E)(ii) waiver, that section is only applicable to those aliens who smuggled in family members prior to May 5, 1988. Accordingly, it is completely inapplicable to this respondent, who smuggled in his children in February 1990. We presume, therefore, that he is referring to section 241(a)(1)(E)(iii) in his brief on appeal.

2/ Although some circuits have allowed lawful permanent residents who are deportable for entering without inspection to apply for a 212(c) waiver, this respondent is not and has never been a lawful permanent resident. See Matter of Bedoya-Valencia v. INS, 6 F.3d 891 (2d Cir. 1993); Matter of Chavez-Calderon, Interim Decision 3212 (BIA 1993).

(3)

Supreme Court, U.S.
FILED
JUL 15 1997
CLERK

No. 96-1789

In the Supreme Court of the United States

OCTOBER TERM, 1996

SAMUEL MARTINEZ-SERRANO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner waived any argument that the Board of Immigration Appeals abused its discretion in denying his motion to reconsider its decision finding him deportable.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 94 F.3d 1256. The decisions of the Board of Immigration Appeals (Pet. Supp. App. 1-7) and the immigration judge are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1996. A petition for rehearing was denied on November 19, 1996. Pet. App. B. The petition for a writ of certiorari was filed on February 18, 1997, and placed on the docket on May 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Mexico, entered the United States illegally in or around 1980. Pet. Supp. App. 5. In 1987, his status was adjusted to that of an alien lawfully admitted for temporary residence under the provisions of Section 210(a)(1) of the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1160(a)(1), as a "special agricultural worker." Pet. Supp. App. 5; see also 8 U.S.C. 1160(a)(2) and (g) (providing for further adjustment of status to that of alien lawfully admitted for permanent residence).

In 1990, petitioner returned to Mexico and brought three of his children (then 4, 8, and 9 years old), all of them Mexican nationals who had not requested or received permission to enter this country, to Mexicali, on the Mexican side of the border between the United States and Mexico. Pet. Supp. App. 5; Pet. 3. Petitioner thereafter was arrested by agents of the Border Patrol who found him, together with his children, on the United States side of the border. Pet. Supp. App. 5; Pet. 3.

2. The Immigration and Naturalization Service (INS) began proceedings to deport petitioner for entering the United States without inspection. Pet. Supp. App. 5. In proceedings before an immigration judge (IJ), petitioner refused to answer questions concerning the time and manner of his last entry into the United States. *Ibid.* He did testify, however, that he brought the children to Mexicali "[f]or the purpose of coming to the United States." Admin. R. 91.

The IJ found that "[t]he only logical inference to be drawn from the respondent's testimony is that he, as well as his three Mexican born children, entered the United States without inspection as alleged." Admin.

R. 63. He held (*ibid.*), however, that the degree of certainty to be accorded that inference was "not germane," because once petitioner had admitted that he was an alien, he became subject to a presumption established by Section 291 of the INA, 8 U.S.C. 1361, that he was in the United States illegally, unless he could establish the time, place, and manner of his legal entry into the country. "In short, based upon the presumption, any doubts with regard to date, place and manner of entry will be resolved against the alien, not for him." Admin. R. 63. Accordingly, the IJ held that deportability had been established "based upon the presumption under Section 291 of the Act." *Ibid.* The IJ granted petitioner the right to depart voluntarily in lieu of deportation, and ordered him deported if he failed to depart. *Id.* at 64-65.

3. On October 3, 1990, Petitioner appealed to the Board of Immigration Appeals (BIA), seeking only a decision allowing him to depart voluntarily without any finding of deportability (on the theory that he could then return to the United States, submitting to inspection at the border, and reclaim his lawful residency status). Pet. Supp. App. 2; Admin. R. 59. In February 1991, petitioner's representative requested and received an extension of time in which to file a brief in connection with that appeal, on the ground that he had been called to temporary active military duty. Admin. R. 49. On July 29, 1991, the Board issued an order holding that once the INS had commenced deportation proceedings, the IJ was required to make some finding on the issue of deportability. Pet. Supp. App. 2. Declaring further that it was "satisfied that the respondent's deportability has been established by evidence that is clear, unequivocal, and

convincing," the Board dismissed petitioner's appeal. *Ibid.*, citing 8 U.S.C. 1361.

In October 1991, petitioner filed a motion asking the BIA to reopen the case and reconsider its previous decision. Pet. App. A, at 10938. In that motion, petitioner's representative asserted that his military service had "precluded submission of additional legal arguments" in connection with the previous appeal. Admin. R. 11. The motion stated that

> the *primary basis* for making this Motion to Reopen and Reconsider is to allow the Board to remand the case of the Moving Party back to the jurisdiction of the Immigration Court, so that the Moving Party might have the opportunity to apply for a waiver of deportability pursuant to section 241(a)(1)(E)(ii) of the Act * * *. This relief was not available to the Moving Party at the time he appeared before the Immigration Judge, nor was it available at the time appeal to the Board was filed.

Ibid. (emphasis in original).[1]

After a discussion (Admin. R. 12-16) of petitioner's theory that such a waiver would allow him to remain a

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[1] Subparagraph (i) of former Section 241(a)(1)(E) of the INA, 8 U.S.C. 1251(a)(1)(E)(i) (1994), rendered deportable any alien who knowingly assisted another alien to enter the United States in violation of law. Subparagraph (ii), added in late 1991 by Pub. L. No. 102-232, § 307(h)(4), 105 Stat. 1755, rendered that provision inapplicable in certain cases involving family reunification. (These provisions were recently renumbered, without relevant change here, by Section 305(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-598, and are now to be found in Section 237 of the Act, to be codified at 8 U.S.C. 1227.) Petitioner was not charged with deportability under former Section 241(a)(1)(E)(i). See Pet. Supp. App. 6-7.

lawful resident, the motion then set out two issues to be considered: Whether the waiver argument just described was "germane to the instant case," and whether the Board had erred in its previous holding that the IJ was required to make a finding concerning deportability. *Id.* at 17.[2] In discussing the first issue, petitioner then argued that the availability of a new type of waiver under a provision dealing with the smuggling of aliens (with which petitioner had never been charged) was relevant to his case because (i) the IJ should not have relied on a presumption under Section 291 of the Act, or on petitioner's refusal to answer questions concerning the circumstances of his entry, to find that petitioner had entered without inspection (*id.* at 18-23), and therefore (ii) petitioner should really have been charged with smuggling his children, and if he had been so charged, the waiver of deportation based on that charge available under recent amendments to the Act would be relevant to his motion to reopen (*id.* at 23-24).

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[2] The motion sets out the following under the heading "Issues in Motion" (Admin. R. 17):

> ISSUE I: Is consideration of an application for waiver of deportability pursuant to section 241(a)(1)(E)(ii) of the Act germane to the instant case?
>
> ISSUE II: Does the Board err as a point of law in declaring, as it does in its decision in the instant case, that the immigration judge "must make a finding on deportability" and that "[n]either the immigration judge nor this Board can allow the alien to depart from the United States voluntarily without making that determination"?

The BIA denied the motion to reopen and reconsider. Pet. Supp. App. 4-7.[3] The Board rejected petitioner's attempt to rely on any newly available waiver under Section 241(a)(1)(E) of the Act, on the ground that petitioner had never been charged with any ground of deportability to which such a waiver might apply. Pet. Supp. App. 6-7. In addition, the Board noted (*id.* at 7) that even if petitioner were granted a waiver under Section 241(a)(1)(E), he would remain deportable as charged under Section 241(a)(2). The Board also adhered to its previous determination that once petitioner had been charged, neither an IJ nor the BIA could grant him voluntary departure without entering a finding on the issue of deportability. *Id.* at 5-6.

4. Petitioner sought review in the court of appeals of both the 1991 dismissal of his initial appeal and the 1994 denial of his motion to reopen and reconsider. Pet. App. A, at 10940. In August 1996, the court of appeals denied the petition for review. *Id.* at 10935-10944. The court held (*id.* at 10940-10941) that it had no jurisdiction to review the BIA's 1991 decision, relying on this Court's holding in *Stone* v. *INS*, 514 U.S. 386 (1995), that the filing of a motion to reopen does not toll the time for appeal from an otherwise final decision by the Board. The court concluded that the petition to review the Board's denial of the motion to reopen or reconsider was timely (Pet. App. A, at 10941-10943), but it found (*id.* at 10944) that the argument portion of petitioner's brief had addressed

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[3] The supplemental appendix erroneously shows a date of July 29, 1991, for the Board's decision on the motion to reopen. Pet. Supp. App. 4. The correct date is June 24, 1994. Admin. R. 2.

only the issue of timeliness and whether the BIA had erred in dismissing his original appeal. Because petitioner's arguments "fail[ed] to address how the BIA abused its discretion by denying his motion to reopen and reconsider," the court held that petitioner had waived any such claim. *Id.* at 10943-10944. The court accordingly denied the petition for review in its entirety. *Id.* at 10944.

4. The court of appeals' mandate issued on March 14, 1997. We are informed that on April 21, the District Director of the INS in San Francisco wrote to petitioner requiring him to report for deportation on May 19. On May 20, Justice O'Connor denied petitioner's application for a stay, and we are informed that petitioner was deported to Mexico later that day.

ARGUMENT

1. Petitioner has been deported to Mexico. Former Section 106(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1105a(c) (1994), which applies to this case, provides that "[a]n order of deportation * * * shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order."[4] "Once an alien has been de-

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[4] Section 106(c) has been repealed, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306(b), 110 Stat. 3009-612, but that change applies only to proceedings commenced on or after April 1, 1997, IIRIRA §§ 306(c)(1) (as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657), 309(a), and the applicable transitional rule specifically provides that earlier deportation "proceedings (including judicial review thereof) shall continue to be conducted without regard to" the repeal. IIRIRA § 309(c), 110 Stat. 3009-625. The deportation proceedings against petitioner were commenced in 1990. Pet. Supp. App. 5.

ported, the courts lack jurisdiction to review the deportation order's validity." *Stone* v. *INS*, 514 U.S. 386, 399 (1995).[5]

2. Even if petitioner's claims were now reviewable, however, they would not warrant review by this Court. To reach the question that he seeks to present, petitioner must first argue (Pet. 16-25) that the court of appeals erred in holding that he had waived any argument that the BIA abused its discretion in denying his motion to reopen or reconsider, as distinguished from committing legal error in its original decision upholding the IJ's order of deportation. The court below adequately explained its reasoning on that fact-bound issue, which does not merit further review. Pet. App. A, at 10943-10944.[6]

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[5] Some courts of appeals have asserted jurisdiction to review executed deportation orders if the deported alien raises a "colorable" constitutional claim. See, *e.g.*, *Camacho-Bordes* v. *INS*, 33 F.3d 26, 27-28 (8th Cir. 1994) (discussing cases). That position finds no support in the language of the Act. Even if it were correct, however, this case involves only the BIA's decision not to reopen its original decision on the merits of the case to consider arguments that petitioner had not previously raised, and the court of appeals' decision that petitioner waived on appeal any argument that that decision involved an abuse of the Board's discretion. Those essentially procedural issues do not involve colorable constitutional claims.

[6] It is not surprising that petitioner's opening brief below focused on convincing the court that the Board had erred in its decision on the merits, because at the time the brief was filed the Ninth Circuit had held that a petition to reopen tolled the time to appeal from the Board's original decision, so that an appeal from the denial of such a motion was, in effect, consolidated with the appeal of the original decision. See Pet. App. A, at 10940; Pet. 5-6. The court of appeals correctly held, however, that once this Court's decision in *Stone* v. *INS* made clear that petitioner's appeal from the Board's original decision

In any event, the Board plainly did not abuse its discretion. As we have described (see pages 4-6, *supra*), petitioner's motion squarely requested only that the Board (i) reconsider the argument, which it had already considered and rejected, that the IJ could have allowed petitioner to depart voluntarily without finding him deportable, and (ii) reopen the proceeding to consider for the first time the potential applicability of a newly enacted statutory waiver provision. The Board rejected both of those arguments—summarily, but in effect on their merits—in denying petitioner's motion. Pet. Supp. App. 5-7. The argument on which petitioner focused in the court of appeals, and which he now seeks to raise in this Court, was available at the time of petitioner's original appeal to the Board, but was presented for the first time in support of the motion to reopen (see Pet. 17), and even then only in an indirect and confusing manner, as part of the new waiver argument which the Board rejected on other and simpler grounds. See pages 4-5, *supra*; Admin. R. 17-23. Even if we assume that, under those circumstances, the Board could properly have reopened the proceedings to reconsider the original issue of deportability, it surely was not required to do so.[7]

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in this case was untimely (see Pet. App. A, at 10940-10941), some argument going directly to the issue of reopening or reconsideration, rather than simply to the merits of the original decision, was necessary to sustain the remainder of the appeal.

[7] We may also assume, as petitioner argues in passing (Pet. 24), that the BIA, like a district court, "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405

3. Finally, even if the question that petitioner seeks to raise in this Court (Pet. i, 7-15) were properly presented, it would not warrant review.

Section 291 of the INA, 8 U.S.C. 1361, provides that an alien in deportation proceedings bears the burden of proving "the time, place, and manner of his entry into the United States," and that an alien who cannot carry that burden "shall be presumed to be in the United States in violation of law." Petitioner argues (Pet. 14-15) that he could establish the requisite lawful "entry" simply by showing that he had once had his status adjusted to that of an alien lawfully admitted and permitted to reside in this country. Even a permanent resident alien, however, must enter the country at designated border crossings and submit to inspection by an immigration official each time he enters the United States—as, for that matter, must a citizen, at least under any normal circumstances. *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 945-946 (7th Cir. 1993); *In re Ruis*, 18 I. & N. Dec. 320 (BIA 1982). The ground for deportation alleged against petitioner in this proceeding was his failure to comply with those requirements at the time of his last entry; and that entry was therefore the relevant one for purposes of Section 291.[8]

(1990). That principle applies, however, only to arguments fairly presented to a tribunal for consideration, and subject to appellate review as of right. It does not alter any of the familiar principles of exhaustion or waiver.

[8] Petitioner relies (Pet. 9-13) on *Trias-Hernandez* v. *INS*, 528 F.2d 366 (9th Cir. 1975), and *Gameros-Hernandez* v. *INS*, 883 F.2d 839 (9th Cir. 1989). Neither decision is inconsistent with the result in this case. *Trias-Hernandez* considered the admissibility of a document containing evidence of admissions by the alien that he had departed from the United States, after

There is, moreover, nothing unreasonable about placing on an alien in this country the burden of demonstrating lawful entry when, as here, that issue is properly raised; and there was nothing unreasonable about the application of that principle in this case. After petitioner conceded alienage but refused to enter a plea concerning entry without inspection or deportability, the IJ took the refusal as a denial and required the INS to proceed. Admin. R. 77-78, 112. Petitioner was informed of his burden to establish proper entry, and of the consequence of failing to do so. *Id.* at 82, 84. Petitioner nonetheless refused to answer questions concerning his last entry into the United States, invoking his right not to be compelled to incriminate himself. *Id.* at 90-91. Petitioner admitted, however, that he went to Mexico because he wanted to reunite his family; that he brought three of his children, all Mexican citizens and ranging in age from four to nine, to a town near the border, for the purpose of coming to the United States; and that he and his children returned to the United States on the

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previously being admitted as a lawful permanent resident, and then had returned illegally. After holding that the document was admissible, the court explicity observed that "[u]nder 8 U.S.C. § 1361, [the alien] bore the burden of proof on the issue of legal entry." 528 F.2d at 370. Because the alien offered no further evidence concerning the circumstances of his return to the United States, the finding of deportability was affirmed. *Ibid.* In *Gameros-Hernandez*, a permanent resident alien testified with respect to the time, place, and manner of his last entry, thus providing evidence to carry his burden under Section 291; the court concluded only that the government's circumstantial evidence of illegal entry was insufficient to overcome the alien's showing. 883 F.2d at 841-842. In this case, by contrast, petitioner refused to testify concerning the circumstances of his last entry, as discussed below.

same day and were apprehended together, in the United States, by agents of the INS. *Id.* at 91-92.

As the immigration judge concluded (Admin. R. 63), "[t]he only logical inference to be drawn from [petitioner's] testimony is that he, as well as his three Mexican born children, entered the United States without inspection as alleged." Indeed, petitioner's refusal even to assert that he entered the country legally, or to testify at all concerning the circumstances of his own entry, invoking a right against self-incrimination, itself gives rise to an inference of illegal entry that is both compelling and, in this context, entirely permissible. See, *e.g.*, *Bilokumsky* v. *Tod*, 263 U.S. 149, 153-155 (1923); *United States* v. *Alderete-Deras*, 743 F.2d 645, 647 (9th Cir. 1984); see also *United States* v. *Rylander*, 460 U.S. 752, 758-761 (1983). Whether phrased in terms of the presumption under Section 291 or as the "only logical inference" from the evidence presented, there is no doubt that the immigration judge's conclusion was well founded and that petitioner was properly deported.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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